

REMARKS

This Application has been carefully reviewed in light of the Office Action mailed June 1, 2006 ("*Office Action*"). Claims 1-36 are pending in the Application, and the Examiner rejects all pending claims. Applicant amends Claims 1-2, 10, 19-20, and 28. Applicant respectfully requests reconsideration of the claims.

I. Section 112 Rejections

The *Office Action* rejects Claims 1-36 under 35 U.S.C. § 112, second paragraph, arguing that the claims are "indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention." *Office Action*, p. 2. Applicant respectfully submits that the claims, as amended, comply with the requirements of 35 U.S.C. § 112, second paragraph. Thus, Applicant respectfully requests reconsideration and allowance of Claims 1-36.

II. Section 103 Rejections

The Examiner rejects Claims 1-36 under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 5,546,379 issued to Thaweethai ("*Thaweethai*") in view of U.S. Patent No. 6,035,020 issued to Weinstein et al. ("*Weinstein*"). Applicant respectfully traverses the rejection on the ground that *Thaweethai* and *Weinstein*, whether taken alone or in combination, fail to teach or suggest all limitations of the claims.

Consider Applicant's independent Claim 1, which recites:

- An access server, comprising:
 - a plurality of modems;
 - a monitoring module coupled to the modems, the monitoring module operable, for each of the modems, to determine a performance attribute that indicates operating performance of the modem based on a combination of at least two of multiple independent samples taken over a period of operation of the modem;
 - a memory operable to store the performance attribute for each modem;
 - an allocation module coupled to the memory and operable to receive a modem request and to select a modem for service according to the modem's performance attribute; and
 - a telecommunications interface coupled to the allocation module and operable to couple a remote modem to the selected modem.

Among other aspects, Applicant respectfully submits that the *Thaweethai-Weinstein* combination fails to teach or suggest "the monitoring module operable, for each of the

modems, to determine a performance attribute that indicates operating performance of the modem based on a combination of at least two of multiple independent samples taken over a period of operation of the modem,” as required by Claim 1.

For these aspects of Claim 1, as previously presented in a wherein clause, the Examiner relies on *Weinstein*. *Office Action*, p. 2. However, the *Office Action* fails to identify a specific section that allegedly teaches or suggests these claimed aspects. Rather, the *Office Action* does generally refers to *Weinstein*, stating:

Weinstein teaches a selector for selecting an available modem from a plurality of modems. From the teaching of *Weinstein*, it would have been obvious to a person of ordinary skill in the art to select an available modem and not a modem taken out of service in *Thaweethai*. It is inherent to require multiple independent samples so as to detect whether a modem is available.

Office Action, p. 2. Even assuming, for the sake of argument, that “[i]t is inherent to require multiple independent samples,” *Weinstein* still fails to teach or suggest the claimed aspects. Simply put, *Weinstein*’s disclosure of selecting an available modem does not teach or suggest a performance attribute that indicates operating performance of the modem based on a combination of at least two of multiple independent samples taken over a period of operation of the modem.

Moreover, Applicant respectfully submits that *Weinstein* fails to inherently teach requiring multiple independent samples so as to detect whether a modem is available, as asserted by the *Office Action*. See *Office Action*, p. 2. While *Weinstein* may teach or suggest selecting an available modem and not a modem taken out of service, there are multiple ways in which available modems may be identified and selected. The specific mode of operation chosen by the *Office Action*, thus, cannot be inherent.

Applicant thus respectfully submits that *Thaweethai* and *Weinstein*, whether taken alone or in combination, fail to teach or suggest, at least, “the monitoring module operable, for each of the modems, to determine a performance attribute that indicates operating performance of the modem based on a combination of at least two of multiple independent samples taken over a period of operation of the modem,” as required by Claim 1. Likewise, independent Claims 10, 19, and 28 include limitations that, for substantially similar reasons, are not taught or suggested by the reference. Because *Thaweethai* and *Weinstein* fail to teach or suggest every element of independent Claims 1, 10, 19, and 28, Applicant respectfully

requests reconsideration and allowance of Claims 1, 10, 19, and 28, and their respective dependent claims.

CONCLUSION

Applicant has made an earnest attempt to place this case in condition for allowance. For the foregoing reasons, and for other reasons clearly apparent, Applicant respectfully requests full allowance of all pending claims.

If the Examiner feels that a telephone conference would advance prosecution of this Application in any manner, the Examiner is invited to contact Kurt M. Pankratz, Attorney for Applicant, at the Examiner's convenience at (214) 953-6584.

Although no fees are believed due, the Commissioner is hereby authorized to charge any fees or credit any overpayments to Deposit Account No. 02-0384 of Baker Botts L.L.P.

Respectfully submitted,

BAKER BOTTS L.L.P.
Attorneys for Applicant

A handwritten signature in black ink, appearing to read 'K-M Pankratz', with a long horizontal flourish extending to the right.

Kurt M. Pankratz
Reg. No. 46,977

Date: August 31, 2006

CORRESPONDENCE ADDRESS:

at Customer No. **05073**